

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2123

ORIGINAL

To be argued by

ALAN M. DERSHOWITZ

United States Court of Appeals

For the Second Circuit

BERNARD BERGMAN,

Petitioner-Appellant,

against

HONORABLE LOUIS J. LEFKOWITZ, New York State
Attorney General, the Justices of the Supreme Court of
the State of New York, sitting in New York County,
Respondents-Appellees.

On Appeal from an Order of the
United States District Court
for the Southern District of New York

BRIEF FOR PETITIONER-APPELLANT BERNARD BERGMAN

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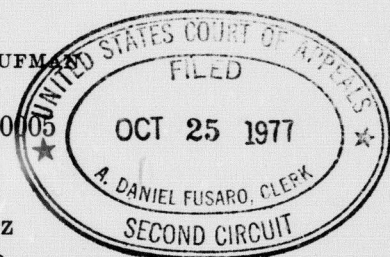


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BERNARD BERGMAN,

Petitioner-Appellant,

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HONORABLE LOUIS J. LEFKOWITZ, New York
State Attorney General, the Justices
of the Supreme Court of the State of
New York, sitting in New York County,

Defendants-Respondents.
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BRIEF FOR PETITIONER-APPELLANT BERNARD BERGMAN

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

Bernard Bergman appeals from an order of the United States District Court for the Southern District of New York rendered by Judge Gerard L. Goettel on October 4, 1977 which denied Bernard Bergman's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The opinion below is not yet reported and appears at A 3-48.

Bernard Bergman had been convicted in the Supreme Court, New York County of a violation of Section 77 of the New York Public Officers Law and was sentenced to a one year term of imprisonment to be served consecutively with a sentence imposed in the United States District Court for the Southern District of New York. Pending

his appeal to the New York courts, Bernard Bergman was released on bail. By an original order of Judge Robert J. Ward, continued by Judge Goettel, Bernard Bergman's surrender in execution of the judgment was stayed pending determination of the petition for a writ of habeas corpus. On October 11, a panel of this Court continued the stay pending determination of the appeal and set an expedited briefing schedule.

QUESTIONS PRESENTED

1. Whether, under the facts and circumstances of this case, the state prosecutor's premeditated press statements critical of the federal sentence constituted a violation of Santobello v. New York, 404 U.S. 257 (1971).

2. Whether, under the facts and circumstances of this case, the state prosecutor's in-court "tepid" sentence recommendation complied with Santobello v. New York.

3. Whether, under the facts and circumstances of this case, the state prosecutor's conduct in opposing the motion to reduce sentence in state court was a violation of Santobello v. New York.

4. Whether the petitioner, by his conduct, waived his rights under Santobello v. New York.

5. What is the appropriate remedy for the violations of Santobello v. New York established in this case.

STATEMENT OF THE CASE

"The essential facts are not in dispute" (A 40).

In the summer of 1975, the newly appointed Special Prosecutor for Health and Special Services, Charles J. Hynes, and the United States Attorney for the Southern District of New York issued virtually identical indictments against Bernard Bergman and others, charging them with violations growing out of the alleged failure to make known certain partnership interests and with alleged fiscal misrepresentations in certain forms filed with state authorities. Rather than trying these indictments, the Special Prosecutor and the United States Attorney's office entered written plea agreements (A 57,61) that were made public on March 11, 1976 in the federal and state courts when the guilty pleas were entered.

Mr. Bergman agreed to plead guilty to two counts of the federal indictment. He also agreed to testify before a state grand jury, after waiving transactional immunity, and to plead guilty to the indictment which would follow from his disclosure of his dealings with Assemblyman Albert Blumenthal. Upon the guilty plea the original indictment would be dismissed. The new state indictment, which could not have been obtained without Mr. Bergman's testimony, was filed the day before the plea of guilty was entered.

The heart of the bargain is undisputed. In return for his pleas of guilty and the information he provided concerning Albert Blumenthal, Bernard Bergman was to receive only one sentence, the federal sentence.

Indeed, the parties had originally agreed in writing that the state judge should be bound not to impose a separate sentence (A 7, 40). However, the state judges refused to bind themselves and the parties then revised the signed agreement and devised a practical equivalent. "An implicit although unwritten term of the plea bargain" was that the sentences were to be imposed on the same date, the state sentence following the federal, and the Special Prosecutor would recommend that Justice Melia impose no sentence additional to that imposed by Judge Frankel (A 9). "The parties wanted his [Judge Frankel's] sentence to cover both federal and state charges" (A 8). Thus, as Judge Goettel noted, the Special Prosecutor was willing to run "a substantial risk that if [the] first bite wasn't very good, the second bite was going to be nothing but the same thing again" (Tr 1361).

On April 13, 1976, Justice Melia dismissed the indictment against Assemblyman Albert Blumenthal, including the charges which resulted from Mr. Bergman's Grand Jury testimony. Although he was "shocked" by the dismissal, Mr. Hynes made no public statements.

About one week prior to the June 17, 1976 sentence date, the Special Prosecutor "began to fear the imposition of an inappropriately light sentence" (Res. Post-Hearing Memo. p. 3). According to Mr. Hynes, he divined Judge Frankel's intentions when he read one word in the forty page transcript of a pre-sentence hearing held before Judge Frankel on June 10, 1976 (Tr 114, 138-40, 1462).

At Mr. Hynes' request, a press statement was then written by his former and current press secretaries, who were concerned that Mr. Hynes' public image be preserved against what could be foreseen as an unfavorable public reaction to a "lenient" federal sentence (Tr 1229, 1481, 1460). Mr. Hynes himself acknowledged that his press people had advised him in June that "a strong statement be made indicating displeasure with the sentence so it would not be assumed by the public that the sentence was one that [Hynes] was happy with" (Tr 1460). It is clear that Mr. Hynes issued the June 17 statement in order to preserve his public image (Tr 1227-1229; A 49,50). Mr. Hynes never set in motion the preparation of a statement that would praise an "appropriate" sentence (Tr 110, 672).

After the imposition of the four month federal sentence by Judge Frankel on June 17, and following the adjournment of the sentencing proceedings in state court, minutes later, the Special Prosecutor invited the press and media to his office for the purpose of distributing and reading his previously prepared statement.* Before the assembled media and a table overrun with television and radio microphones and videotapes, Mr. Hynes read his entire "emotional message" (Tr 1458). In the statement, Mr. Hynes stated not only his extraordinary disappointment in the sentence, but he also underscored, in several different ways, his concern that justice had not

*References by Judge Goettel to a statement distributed by Mr. Bergman are clearly erroneous. Not only did Mr. Bergman never read it to the press, but the statement speaks to vindication of his reputation and is not at all addressed to the federal or state sentence (Res. Ex. 4).

been served by the sentence imposed by Judge Frankel. Mr. Hynes' statement began:

"I am extraordinarily disappointed by the sentence that Bernard Bergman received today. One wonders whether essential justice has been accomplished when a man such as Bernard Bergman is given this kind of sentence. I am deeply troubled and discouraged by the cynicism generated by what the people consider to be special justice for the privileged." (emphasis added; see A 43).

At the press conference Hynes did more than read and distribute his previously prepared statement. Despite strong advice by members of his staff not to speak extemporaneously, in order to prevent any misinterpretation by the press about his true feelings (Tr 1258-9, 156-8, 171), Mr. Hynes decided that he would speak about the state proceedings which, at his request, had been adjourned for two weeks. Mr. Hynes repeatedly testified that he did not repudiate the plea bargain at the press conference, yet, as Judge Goettel found, Mr. Hynes made the following statement in response to an undetermined question:

"As of today I consider that agreement a nullity and I am no longer bound by requesting that Judge Melia impose a concurrent sentence. I am no longer bound by any indication that we would no longer investigate or prosecute. I am no longer bound by any agreement not to prosecute Stanley Bergman. As I indicated, because of reasons relating to double jeopardy Bernard Bergman cannot be prosecuted for fraud, his son Stanley can be." (A 44; Tr 1444-5; Pet. Ex. 24; emphasis added).*

This statement is an unmistakable violation of the plea bargain.

*Although it is cast in the present tense and clearly reflects a "current state of facts" (Tr 1441), Judge Goettel nevertheless enigmatically opined "it is possible, therefore, that the question posed [which elicited this statement] was hypothetical, i.e. what he would do in certain contingencies" (A 44). While anything "is possible," the intonation in Mr. Hynes' voice in which the words "I am no longer bound" is emphatically pronounced three different times leaves no doubt that he publicly conveyed his then current position. In any event, it was the "I am no longer bound" language which was publicly disseminated.

As the sentencing judge in the state court and as the judge intimately familiar with the unique federal-state sentencing arrangement, Judge Melia had an obvious professional interest in the sentencing proceedings in the Bergman case (Tr 1089). Soon after the press conference, and certainly by the following day, Judge Melia became aware of the Special Prosecutor's "extraordinary disappointment" concerning the federal sentence (Tr 1148).^{*} Moreover, at the time he learned of Mr. Hynes' critical opinion, Judge Melia knew that Mr. Hynes was constitutionally obligated to recommend no additional sentence in state court (Tr 1149-50).

Judge Melia subscribes to the daily New York Times and New York Law Journal (Tr 1087). The New York Times on June 18, 1976 carried a front page story (A 36) [with a box indicating that the complete text of Mr. Hynes' statement was on the same page as the end of the article], about the Bergman federal sentence and about the proceedings that had occurred before Judge Melia in state court on June 17, 1976. Judge Melia testified:

Question: On the day following the imposition of the sentence by Judge Frankel on Dr. Bergman, there appeared a story on the front page of the New York Times involving that sentence. Is it fair to say as you sit here now that it is certain that you would have read that story?

Answer: Yes (1090; emphasis added).

^{*}Furthermore, the substance of Prosecutor Hynes' criticism of the Frankel sentence was underscored to Judge Melia when on June 28, 1976, in an unprecedented ex parte meeting, Assemblyman Andrew Stein, "echoing many of the sentiments of Hynes' press statement urged Justice Melia to impose a substantial jail sentence" (A 11; Tr 579-582).

Judge Melia testified that he assumed he read the text of the statement (see A 36).

The Court: You base this assumption on the fact that you usually read the Times fairly thoroughly?

Judge Melia: Yes, and particularly in a matter with which I had a connection" (Tr 1042).

The New York Law Journal of June 18, 1976 also carried a front page story about the Bergman case with a headline "Special Prosecutor Disappointed". This story indicated that "Bergman was to receive a concurrent sentence in state court" and that Mr. Hynes was "extraordinarily disappointed" in the federal sentence which he characterized "as special justice for the privileged." Justice Melia's testimony about his having read this story is unequivocal.

Question: Your answer then I take it is that your recollection has been refreshed and it is now your testimony you did read this [Law Journal] article.

Answer: Yes, sir (Tr 1091).

Moreover, Judge Melia undoubtedly saw some of Mr. Hynes' extrajudicial critical comments when he watched television on the night of June 17, 1976. For it was his habit to watch at least one of the three major networks' 11:00 p.m. newscast (Tr 1097-8), all of which showed videotapes of portions of the press conference. Judge Melia knew there would be television coverage that evening because of his observation of the many media representatives, including television sketch artists, who inundated his courtroom and the courthouse on June 17.

As Judge Goettel found, "public response to the [federal] sentence was immediate, substantial and generally adverse" (A 11).

This foreseeable and substantial media and press criticism of Judge Frankel's sentence was certainly sparked, at least in part, by Special Prosecutor Hynes' conduct on June 17, 1976. Indeed, Mr. Hynes' statement refers to "what the people consider to be a special justice" (A 43), but, of course, "the people" had yet to be heard from; no "public" reaction could have been discerned by anyone in the week prior to the sentence when the statement was written. Indeed, the Special Prosecutor, aware of the press and media interest concerning the Bergman sentencing, deliberately encouraged the creation of the foreseeable prejudicial publicity which the parties sought to avoid (A 41), and which came to weigh upon Judge Melia.

Thus, there is overwhelming support for Judge Goettel's finding that "Hynes' statement attacking the federal sentence was clearly and totally unwarranted and improper" (A 33), and that "Hynes' words clearly reflected on the impending state sentence since he was committed to recommending the same sentence. As such it violated Disciplinary Rule 7-107(E) of the New York Code of Professional Conduct . . ." (A 33). Of course, the purpose for this disciplinary rule [cf. Rule 8 of the Criminal Rules of the United States District Court for the Southern District of New York which prohibits such statements "prior to the imposition of sentence"] is clear. These rules seek to prevent the type of prejudicial public pressure which developed in the Bergman case and which came to bear on Judge Melia. While judges obviously live in the real world, prosecutors are enjoined not to pander to public pressure which renders the sensitive judicial task of sentencing even more difficult than it otherwise is.

As the man who falsely shouts "Fire" in a crowded theater cannot escape culpability because he is lost in the crowd stampeding for the exit, so too Mr. Hynes can seek no refuge even if "[his] voice was lost in the general din" (A 36). For here it was a din which commenced at Mr. Hynes' press conference which he provoked if not intentionally orchestrated.

Mr. Bergman was sentenced by Judge Melia on September 14, 1976. On that morning, he and his wife signed a confession of judgment in the amount of \$2.5 million and they assigned to the Special Prosecutor all of their assets. There is no doubt that, as Mr. Hynes told Judge Melia, on September 14, that Mr. Bergman's part of the plea "agreement [has] now been satisfied" (Pet. Ex. 4 p. 55). Despite the conceded total compliance by Mr. Bergman, Mr. Hynes never made a forthright sentence recommendation.

Indeed, there is ample support for Judge Goettel's finding that "there is no doubt that the Special Prosecutor's recommendation of no additional sentence was tepidly offered" (A 25). The very style and content of the sentence recommendation is precisely what Mr. Hynes had been cautioned not to do the night before by several members of his staff. Specifically, Mr. Bourgeois, who had substantial authority for the prosecution of the Bergman case in the Special Prosecutor's office, urged Mr. Hynes "not to speak in terms of an obligation under the plea agreement or his being constrained to make a recommendation to the court" (Tr 262, emphasis added). At the meeting the night before sentence, in Mr. Hynes' presence, Mr Bourgeois disputed the "hawks," including Mr. Hynes' former and current press secretaries,

who encouraged Mr. Hynes to indicate in court that "I am constrained, I reluctantly recommend, words to that effect. Words indicating a lack of enthusiasm for the task he was undertaking" (Tr 316). Of course, as Judge Goettel implicitly found, Mr. Hynes, urged by his press people to "preserve [his] public image. . .[so] that he would not indeed be pilloried or become the object of public controversy" (Tr 1230-31) embodied the very hawkish position he had been encouraged to avoid.

That hawkish position is embodied in petitioner's exhibit 13-C written by Mr. Hynes' press people. The document is peppered with begrudging concessions and caveats and it makes two essential points: (a) Mr. Hynes should be reluctant in his sentence recommendation, although he should mouth the bargained-for recommendation and (b) Mr. Hynes should express the intransigence of the Bergmans in resolving their civil liability to the state. An examination of that exhibit with what Mr. Hynes actually said at sentence on September 14, 1976 reveals that nearly 50% of the exhibit was directly copied for use in court and the copied part comprised nearly 40% of what Mr. Hynes actually said (Pet. Ex. 4, pp 53-56). More importantly, Mr. Hynes' comments in court adopted the thrust if not all the language of the exhibit; that is, constraint, obligation in making the sentence recommendation and condemnation of the Bergmans for the complex negotiations which ultimately resolved the "restitution" question to his satisfaction. Mr. Hynes' in-court statement constitutes a deliberate attempt to promote public relations image, an attempt to avoid his being pilloried

in the media.* In short he expressed his "constraint."

Mr. Hynes' feeling that he was "constrained" to make the "recommendation" was apparent even before the day of sentencing. Indeed, in sentencing remarks which Judge Melia wrote prior to the date of sentence (Tr 1080), he noted that "the Special Prosecutor feels constrained to extend credit to the defendant for the compliance exacted. . ." (A 68).

On his appeal to the Appellate Division, First Department, Mr. Bergman argued essentially the points described in this brief. That court affirmed the judgment of conviction without opinion. People v. Bergman, 57 A.D. 2d 749 (1st Dept 1977). Judge Wachtler denied an application for permission to appeal to the New York Court of Appeals on June 1, 1977. See 42 N.Y. 2d 890 (1977)

Mr. Bergman applied in Supreme Court, New York County, for a reduction of the sentence imposed in accordance with a well established practice in which New York County Supreme Court Justices have entertained such applications under the implicit authority of CPL §430.10. After strenuous opposition by Mr. Hynes and members of his office, Judge Melia denied the application on June 23, 1977.

On July 8, Mr. Justice Marshall, acting as the Circuit Justice, denied Mr. Bergman's application for a stay or bail pending determination of a petition for certiorari. The petition for certiorari was

*For, as Mr. Jewell, Mr. Hynes' former press secretary, testified he told Hynes that if Judge Melia followed the bargained-for sentence recommendation, i.e. a four month concurrent sentence, Hynes would bear the brunt of the press and media criticism (Tr 1225).

not filed. Later, on the afternoon of July 8, Bernard Bergman commenced the instant application for a writ of habeas corpus.

On July 11, Judge Ward, sitting in Part 1, granted Bernard Bergman a stay of the state surrender which was then set for July 12, 1977, pending a hearing on the petition. The appeal taken by respondents to this Court was dismissed on July 18.

An extensive hearing was conducted before Judge Goettel during July and August 1977. Judge Goettel continued the stay of surrender pending determination of the petition. On October 4, 1977, Judge Goettel denied the petition in a lengthy opinion, which is reproduced at Appendix 3-48.

An appeal was taken to this Court pursuant to Judge Goettel's certificate of probable cause and a panel of this Court on October 11, 1977 continued the stay pending determination of the appeal.

ARGUMENT

INTRODUCTION

This case involves the application of Santobello v. New York, 404 U.S. 257 (1971) and its progeny to a complex joint state and federal plea bargain. In Santobello the Supreme Court held that when a plea of guilty "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." There is no doubt that the prosecutor's promise to recommend no additional sentence in state court was a significant part of the "inducement or consideration" for Bernard Bergman's plea of guilty. That promise was violated time and again.

This is a case in which the trial court found that the "essential facts were not in dispute" and that "the application of the Santobello principles under the law in this Circuit is a difficult task." (A 40,36). The district court acknowledged that "if we were to look solely at the majority opinion in Palermo v. Warden" [575 F. 2d 288 (2d Cir. 1976)] -- this Circuit's most recent interpretation of Santobello -- "we could conclude that the acts of the Special Prosecutor constituted a violation of the plea bargain." (A 36, 37). But instead of relying on the majority in Palermo, the district court cited the dissenting opinion of District Judge Bartels and relied on the earlier and clearly inappropriate case of United States v. Podell, 519 F. 2d 144 (2d Cir.), cert denied, 423 U.S. 926 (1975). Accordingly, this appeal presents the Court with an important set of legal issues involving the application of the decisional law of this Circuit -- and other Circuits -- to a set of facts which is essentially undisputed. This Court is thus in a better position to render judgment in this case than was the district court and need not -- and indeed should not -- pay the usual deference to the district court's decision below.

I. The Special Prosecutor's Course of Conduct in This Case Included Several Independent Violations of Santobello. Taken Together, This Course of Conduct Constituted One of the Most Blatant and Indefensible Violations of Santobello in the Recorded Case Literature.

A. The Special Prosecutor's premediated statements to the press following Judge Frankel's imposition of sentence constituted an independent violation of Santobello.

The district court, after viewing videotapes of the television coverage of the three major television stations, and hearing cassette

tapes of the radio coverage, found that the Special Prosecutor delivered an "emotional message" on the day of Judge Frankel's federal sentence (A 11); that the message was delivered by means of "a formal press statement" made at a press "conference" in front of "assembled television cameras and radio microphones" (A 11); that the "press statement had been prepared by [the Special Prosecutor] several days in advance [of the federal sentence, since the Special Prosecutor] had apparently foreseen a short federal sentence."

There is, of course, no dispute about the content of the Special Prosecutor's "emotional message," since the agreed upon text is part of the record of this case (A 43, 44). The Special Prosecutor stated that he was "extraordinarily disappointed by the sentence" that he was obligated to recommend that the state judge impose; he wondered whether "essential justice has been accomplished [by] this kind of sentence;" he said that he was "troubled," "discouraged," and "saddened" by the impact of "insubstantial prison sentences;" he warned that his continued investigation of the nursing home industry may "be adversely affected by this sentence;" he suggested that the "sentence handed to Bernard Bergman today "would cause" a repeat of the nursing home scandal in 5 or 10 years;" and he categorically announced that "the people" -- who had as yet not expressed any views on the two hour old sentence -- "consider [this sentence] to be a special justice for the privileged."

Lest there be any doubt that these statements -- delivered before television cameras and radio microphones in "emotional" tones -- reflected on the state sentence that the Special Prosecutor was

obligated to recommend, the district court made an explicit finding that it did: "Hynes' words [in the press statement] clearly reflected on the impending state sentence since he was committed to recommending the same sentence." (A 33).*

The trial court found that "Hynes' statement attacking the federal sentence was clearly and totally unwarranted and improper. . . ." (A 33). After hearing extensive testimony on the circumstances under which it was drafted and delivered, and after receiving extensive briefs on the issue,** the trial court concluded that:

"the statement is manifestly contrary to state law. Hynes' words clearly reflected on the impending state sentence since he was committed to recommending the same sentence. As such it violated Disciplinary Rule 7-107(E) of the New York Code of Professional Conduct which prohibits prosecutorial statements prior to sentencing that are 'reasonably likely to affect the imposition of sentence.' N.Y. Jud. Law (McKinney 1975). (A 33).***

*Nor can there be any doubt about the Special Prosecutor's motive: the trial court made an explicit finding during the course of the hearing that "from a motive standpoint, you have established that [the Special Prosecutor] was extremely unhappy with the federal sentence and obviously was hopeful that the state would give a greater sentence" (Tr. 185-186).

**In light of the trial court's finding on the impropriety of the press statement, and in light of the extraordinarily expedited briefing scheduled on appeal, appellants have not briefed this issue anew. The relevant sections of appellants' brief before the trial court on this issue are incorporated herein by reference.

***The trial court also concluded that: "it is clear that such prosecutorial statements in the context of a pending criminal case are improper and can be prejudicial.²⁷" (A 33). Footnote 27 of the district court's opinions reads as follows:

See also 'The Prosecution Function,' ABA Tentative Draft with Amendments (1971) and the ABA Standards Relating to Sentencing Alternatives & Procedures § 5.3(c) (1967).

(footnote continued)

Moreover, there can be no room for doubt on the record of this case that the state sentencing judge received the Special Prosecutor's emotional message. The trial court concluded that the state sentencing judge "assumes he read it [the text of the Special Prosecutor's press statement] in the New York Times."

(A 36). A reading of Judge Melia's own testimony at the hearing leaves absolutely no doubt that he did read it in the New York Times, read of it in the New York Law Journal; that he saw a videotape of it on television (see page 8, supra).

In the face of this record, and these findings and conclusions, it is difficult to understand how the district court could have held that the Special Prosecutor's deliberate, premediated, and unethical statement, undercutting the very sentence he was obligated to recommend, did not constitute a violation of Santobello v. New York, 404 U.S. 257 (1971). The district court rests its Santobello holding on the observation that "no specific term of the plea agreement was breached by the press statement." (A 24). This, of course, is true of virtually every Santobello violation found by the courts.

(footnote *** continued from previous page)

As one court observed in Snowden v. State, 365 A. 2d 321, 325 (Ct. Spec. App. Md. 1976), a prosecutor 'might do well to contemplate a reflection of Publilius Syrus in the first century B.C.: 'I have often regretted my speech, never my silence.' '

While the statement may not have been intended to affect the sentencing judge, had sentencing occurred sooner the statement might conceivably have affected sentencing. Moreover, without regard to the state sentence, the remarks reflected unfairly upon a federal judge who was doing his conscientious best to deal with a very difficult sentencing problem complicated by a strange plea agreement struck by the prosecutors.

In preparing a plea agreement, a defense attorney cannot be expected to anticipate -- and include an explicit provision prohibiting -- conduct by the prosecutor that is "manifestly contrary to state law" and in violation of explicit ethical prohibitions. Indeed, any self-respecting prosecutor would be indignant if a defense attorney, in negotiating a plea bargain, were to suggest the inclusion of a provision expressly prohibiting the prosecution from engaging in illegal and/or unethical conduct. There is no surer way of making plea bargaining more difficult -- if not impossible -- than by requiring, as the district judge did here, that the defense attorney must insist that the prosecutor agree in writing not to engage in conduct that is both illegal and unethical.

The fallacy of the district judge's reasoning is best demonstrated by considering a close analogy. Assume that a prosecutor had agreed in writing -- as the Special Prosecutor did here -- to recommend that whatever sentence was imposed by the federal judge should be imposed concurrently by the state judge; assume that after the federal sentence and before the state sentence, the prosecutor had a secret ex parte meeting with the state judge at which he told the state judge that although he was going to make the agreed upon recommendation in open court, he wanted the judge to know that he really hoped that he would impose a much harsher sentence; assume that after this ex parte communication and the agreed upon in court recommendation, the state judge imposed a much harsher sentence than the one recommended by the prosecutor in open court. Surely, no

plausible argument could be made that the prosecutor's ex parte communication did not constitute a violation of Santobello because the parties had not included in their written agreement an express provision forbidding the prosecutor from engaging in any illegal and unethical ex parte communications with the state judge at which he undercuts his in-court sentencing recommendation. Quite obviously, all courts would hold that a reasonable defense attorney is entitled to rely on the assumption that the prosecutor will not engage in illegal and/or unethical conduct. It would be preposterous to require a defense attorney to catalogue in a plea agreement all the illegal and/or unethical conduct that a prosecutor could possibly engage in to undercut the plea bargain. Moreover, even if a defense attorney could come up with an all-inclusive list, no self-respecting prosecutor would sign such an agreement.

The district court's opinion repeatedly confuses two aspects of the prosecutor's statement as it relates to the plea agreement: (1) the fact that he made a public statement about the sentence, i.e. the form of the statement he made; and (2) the content of the statement he made. The district court made the following findings:

The parties had made no agreement, explicit or otherwise, about public statements after sentencing. (this contractual silence may have resulted from their expectation that both the state and federal sentences would be imposed on the same day, in which case there would have been no opportunity for such statements.) Moreover, the absence of such an agreement -- even an implicit one -- is further evidenced by the fact that Bergman and his counsel also felt free to make public statements following the sentencing, and they did so.

It cannot be reasonably argued that Bergman's guilty plea was induced, to any significant degree, by some unstated understanding that the prosecutor would make no public statement about the case. The plea bargain was carefully negotiated and drafted by competent counsel and contained no such term. For this reason, the voluntariness of Bergman's plea and the performance of the agreement by Hynes cannot be impugned on this ground. United States v. Podell, 519 F. 2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975). (emphasis added; A 24-5)

Assume arguendo that there was no agreement, explicit or otherwise, that the Special Prosecutor would make no public statements after sentencing; all that would follow from this is that Santobello was not violated by the fact that the Special Prosecutor made a public statement about Bergman after the federal sentencing. It would not follow that Santobello was not violated by the content of the statement made by the prosecutor. There was surely an implied agreement that the Special Prosecutor would make no statement of any kind -- public, private, oral, written -- that would undercut or contradict the recommendation that he was obligated to make in open court. If this constraint is not implied -- or indeed legally required -- in a plea bargain obligating the prosecutor to make a sentencing recommendation, then sentence-recommendation plea agreements are not worth the paper on which they are written and Santobello was a dead-letter when it was decided.

It may well be true that Bergman's guilty plea was not "induced, to any significant degree, by some unstated understanding that the prosecutor would make no public statement about the case." (A 24; emphasis added). But it surely is true -- and the district court

has not suggested the contrary -- that Bergman's plea was induced by a clear understanding that the prosecutor would not make any statement capable of being heard by the state sentencing judge that undercut the sentencing recommendation that he was obligated to make in open court. It is clear that appellant would never have agreed to waive his constitutional right to a trial in exchange for a formal in-court recommendation coupled with an out-of-court communication undercutting that recommendation. No competent counsel would have recommended that Bergman sign the plea agreement if the plea agreement had included a provision permitting the Special Prosecutor to hold a press conference at which he denounced the sentence he was obligated to recommend in the emotional terms employed by the Special Prosecutor here. The content and not the form of the Special Prosecutor's emotional attack on the federal sentence is the gravamen of appellant's Santobello contention. The district court, by addressing the wrong issue, reached the wrong result.

Not surprisingly, the petitioner has found no case supporting the district court's conclusion that a prosecutor may -- consistent with his obligations under Santobello -- issue a communication undercutting his agreed upon sentencing recommendation, so long as "the parties have made no agreement, explicit or otherwise, about public statements after sentencing." (A 24).*

*In his brief before this Court on appeal from Judge Ward's stay, the Special Prosecutor stated his position as follows:

Santobello does not require anything more than that the prosecutor keep his promise in court. It does not prevent him from explaining to the public that the sentence he is duly bound to recommend is nevertheless inadequate to vindicate the public interest. (emphasis added).

In People v. Kaanehe, 559 P. 2d 1028 (S. Ct. Cal. 1977), the parties had agreed that "at the time of imposition and judgment of sentence the People would give up their right to recommend or argue disposition of the case." 559 P. 2d at 1035, emphasis added. The People contended -- with some semantic plausibility -- that the words of this agreement "only prohibited the prosecutor from making a recommendation at the formal sentencing hearing." Id., emphasis added. The prosecutor had, in that case, stated his views that the defendant "ought" to be imprisoned to the sentencing judge in an untranscribed chambers conference, at which the defense was present, prior to the formal imposition of sentence. The California Supreme Court found the prosecutor's conduct to constitute a violation of the agreement, concluding that it could not discern "any significant distinction" between the formal sentencing hearing and the off-the-record communication in chambers. The obvious intent of the agreement, said the Court, was to "preclude the prosecutors from being heard in connection with the sentence to be imposed." Id. That intent was violated by the communication of the prosecutor's negative views by any means or in any setting.

The Special Prosecutor's violation here was at least equally egregious. The obvious intent of the agreement here was that the state sentencing judge would receive but one single and unequivocal message concerning the sentence being recommended by the Special Prosecutor: that message was to be that the sentence imposed by Judge Frankel was the appropriate sentence for petitioner and that no additional sentence should be imposed by the state judge. Instead

Judge Melia received two messages which were -- at best -- inconsistent.* One message declared that the Special Prosecutor was "extraordinarily disappointed" by the Frankel sentence which he characterized as "special justice for the privileged," and "insubstantial"; the Special Prosecutor also wondered whether it had accomplished "essential justice" and he feared that it would "adversely affect" his continuing investigation. The second message -- delivered on the day of formal sentencing -- was that the Special Prosecutor had "the obligation to fulfill [his] commitment" and to make "the recommendation that [he] was required to make." The message, taken together, plainly convey the following "bottom line":

I am obligated and required to fulfill my commitment by recommending a sentence that I regard as disappointing, special justice for the privileged, essentially unjust, insubstantial, and one that will adversely affect the work of my office; there, I have made the formal recommendation "that I was required to make" in open court, but to the extent your Honor may be relying on my real views, they were previously expressed elsewhere.

This case is thus indistinguishable from Kaanehe on its facts. Indeed, in the actual context in which it occurred, the Special Prosecutor's conduct here constituted a far more serious breach of the agreement. As the district court recognized, it was an essential and practical part of the agreement that the Special Prosecutor would take the public responsibility for recommending no additional time, so that the entire burden of imposing that sentence -- a sentence that was obviously going to be unpopular with the press -- would not have to be shouldered by the state sentencing judge (A 27; Tr 415-16).

*It is appellant's contention that the two messages were -- in actuality -- both consistent with the Special Prosecutor's desire that Judge Melia impose a sentence in excess of the federal sentence.

But once the Special Prosecutor's personal views of the Frankel sentence had been communicated through the media in order to preserve Mr. Hynes' "public image" (Tr 1229, 1487, 1460), the responsibility for imposing no additional time could not be placed on the Special Prosecutor's shoulders. Thus, the highly political, media-conscious nature of the case made the Special Prosecutor's out-of-court communications of his views a far more serious breach of the plea agreement than in Kaanehe.

There can be no doubt -- and we do not understand the Special Prosecutor or the district court to dispute this -- that there would have been a clear violation of Santobello if the Special Prosecutor had included the statements he made to the press on June 17, 1976, in his sentencing recommendation made in Judge Melia's courtroom on September 14, 1976. Without belaboring the obvious, it is plain that petitioner did not give up his constitutional right to a jury trial in exchange for a "recommendation" which included the Special Prosecutor's personal view that the recommended sentence was disappointing, essentially unjust, insubstantial, etc. It is simply beyond dispute that Santobello would not permit a prosecutor who had promised to recommend a sentence to express -- as part of his in-court recommendation -- the kind of views expressed by the Special Prosecutor at his press meeting of June 17, 1976. The only response offered by the Special Prosecutor and the district court -- the same one rejected by the court in Kaanehe -- was that the agreement governed only his formal sentencing recommendations at the sentencing hearing. But surely even the Special Prosecutor would have to acknowledge

that his obligation went beyond the confines of the courtroom on the day of the imposition of sentence: surely it would apply as well to a written pre-sentence statement submitted weeks prior to sentencing; no one could seriously argue that a prosecutor could properly undercut his in-court recommendation by presenting contrary views in a previously submitted pre-sentence statement. Surely it would apply as well to a pre-sentence statement made by the prosecutor to the probation department which then found its way to the judge via the pre-sentence report submitted to the judge by the probation department. These obvious examples are simply designed to illustrate the self-evident conclusion -- never once doubted by any other court, to petitioner's knowledge -- that a prosecutor's agreement relating to a sentencing recommendation is not limited to his formal in-court appearance before the judge at the sentencing hearing.

There is absolutely no reason -- in law, logic, or policy -- why the prosecutor's obligation is not applicable to a premeditated press statement prepared at a time when sentencing was imminent, and delivered at a time when sentencing appeared to be -- at most -- a few weeks in the future.* Since the record is now clear that Judge Melia had read the Special Prosecutor's prepared and rather formal statement which was reprinted in The New York Times, there can be no distinction between this form of communication and the others discussed above. Moreover, the record of this case not only establishes that

*When the Special Prosecutor made his statements on June 17th, he knew sentence had been adjourned to July 2nd and, he could not have foreseen that the state sentencing would be put off for twelve weeks. In any event, this delay can have no significance since it is clear that Judge Melia remembered more than a year later that Hynes had been critical of the federal sentence (Tr 1148). Surely he had not forgotten Hynes' much-publicized statements twelve weeks after he read them.

Judge Melia was aware of the Special Prosecutor's true feelings about the sentence he had agreed to recommend, it also establishes that Judge Melia was fully aware at the time he was imposing sentence that the recommendation that the Special Prosecutor was making in court was one he felt "constrained" to make (A 68).

Indeed, in the practical-political context of this case, the form of communication selected by Hynes -- a media event designed to protect his public image -- constituted a more serious violation of the agreement than would a less-publicized letter or pre-sentence statement submitted at the same time.

From its inception, everyone involved knew that the Bergman case was in the public spotlight. The defense had communicated to the Special Prosecutor that any delay between federal and state sentencing would subject Judge Melia to a barrage of public pressure (Tr 255-6, 1389-90; A 41), pressure which would be all the more intense and prejudicial if the federal sentence were perceived by the media and public as too lenient (Tr 173, 364, 445).

Aware of these problems and literally deluged by a press and media eager for stories about the Bergman sentencing (Tr 695, 1486, 1488, 1503, 661, 663, 665, 688), Mr. Hynes, intentionally and deliberately planned the distribution and release of an explosive statement criticizing the federal sentence as too lenient, and, to insure that the public outcry he was sparking would have time to ignite, he also vigorously requested an adjournment of the state sentencing creating the very delay and opportunity for pressure the parties had sought to avoid (e.g., Pet. Ex. 3 and Pet. Ex. 24).

Mr. Hynes' comments in state court on June 17, 1976 helped initiate that barrage of publicity. Mr. Hynes, who had decided at 2:00 a.m. that day to request a postponement (Tr 179), fervently requested, over strong defense objection, that the state sentence not proceed; he knew, based on Judge Melia's statements to counsel during the prior week, that his request for a delay would probably be granted (Tr. 1065-6).^{*} Furthermore, the request included a

^{*}If the Special Prosecutor believed that sentencing should not go forward until the civil liability was resolved, he had a remedy that was consistent with his agreed-upon obligation to recommend, and not to oppose, same day sentencing. He could have requested postponements of equal duration for both the federal and the state sentencing. At the very least, he could have informed Bergman's lawyers prior to the imposition of the federal sentence of his decision to request a postponement of the state sentencing; he was in federal court with them before Judge Frankel assumed the bench. Bergman's lawyers could then have decided whether they should request a postponement of the federal sentence to assure that both sentencing dates were again the same. Instead, Hynes kept his decision secret from both the defense and the federal judge. He revealed it only after the federal sentencing had gone forward. That his decision to seek a postponement of the state sentencing was a surprise to the defense is apparent from Mr. Lewin's reaction in the record of the state proceedings of June 17th:

Mr. Lewin:

Mr. Hynes' statement this morning, which I can only describe as absolutely shocking, is a culmination of a series of breaches of the agreement which he refers to, which he began several weeks ago with the submission of a document to the United States District Court.

Now, we desisted prior to this time from moving to withdraw any plea notwithstanding the violation by Mr. Hynes in terms of that agreement; but is simply astounding to hear him say here today, the first words he said that when he stood up was that he opposed the imposition of sentence today, when it was in fact Mr. Wilson of his office who had solemnly assured us and our client that under all circumstances, they would support and receive from your Honor an assurance that both sentences will be given on the same day and Mr. Hynes now had stood up and said that he would oppose that.

(Pet. Ex. 4, p. 25).

vigorous denunciation of the civil liability figure proposed by the defense. Hynes characterized the amounts suggested as "palpably absurd" (Pet. Ex. 4, p. 23). He further threatened to rescind the entire plea agreement if "restitution" was not resolved to his satisfaction in the immediate future (id.). Specifically, he threatened to withhold his bargained for sentence recommendation (id.). Mr. Hynes obviously wanted these comments reported widely in the press. Indeed, his press secretary encouraged the press to go directly to state court after the federal sentencing because in state court Mr. Hynes would be saying something "worth learning" (752-3).

It is beyond cavil that the distribution and reading of the press release and the other extemporaneous statements made at the conference held later the same date at Mr. Hynes' office further pandered to the intense press and media appetite concerning the Bergman sentence. As austere a publication as the New York Law Journal placed "State Prosecutor Disappointed" in the headline of its front page article relating to the events of June 17 and the

(footnote continued from previous page)

It is true, of course, that Judge Melia had previously indicated a reluctance to impose sentence on June 17th, but the defense expected -- and had every right to expect -- that the Special Prosecutor would join in their request for state sentencing on that day and that Judge Melia would probably accede to the joint request by both parties. The defense did "move. . .to consider sentencing this morning. . .," but the Special Prosecutor -- in violation of Mr. Wilson's express agreement -- "move[d] in opposition to that request for sentencing today. . ." (Pet. Ex. 4, p. 22). Whatever Judge Melia might have done is monumentally irrelevant to the Special Prosecutor's Santobello obligation. The Prosecutor was obligated to make the agreed-upon recommendation -- i.e., that the state sentence should go forward on the same day as the federal sentence -- and the record is clear here that he formally moved in opposition to the defense request for same-day sentencing. Petitioner's agreement to plead guilty in this case was made -- according to respondents -- "not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statement in court." *Correale v. United States*, 479 F. 2d 944, 949 (1st Cir. 1973). Here, the Prosecutor's statement in court was precisely the opposite from what Mr. Wilson had agreed it would be.

other newspapers and television and radio stations gave equal prominence to Mr. Hynes' statements both in and out of court that date (see e.g. Pet. Exs. 3, and 24, press, television and radio editorial comments which echoed Mr. Hynes' criticism of Judge Frankel's sentence).

Accordingly, in the context of this case, the Special Prosecutor's press statements of June 17, 1976 -- by themselves and without more -- constituted a fatal non-compliance with the agreement under Santobello. Judge Frankel made the point in understated terms when he observed on September 15, 1976, that:

I must confess that there is some question in my mind when a prosecutor has agreed to recommend that some sentence be followed and then he walks out of the courtroom where that sentence is imposed and says it is an outrage and a travesty and so on and then dutifully walks into the next court and says, "But I am recommending you follow,"

I have some question whether the Santobello case or any other would regard that as a full performance of the agreement.*

Transcript of September 15, 1976, pp. 7-8.

- B. The Special Prosecutor's prepared statement to Judge Melia on September 14, 1976, constituted an independent failure to comply with his agreement under Santobello.

It is appellant's contention, amply supported in the case law, that the Special Prosecutor's in-court sentencing recommendation -- by itself and even in the absence of the previous press statements -- would not have constituted compliance with the agreement under

*The fact that Judge Frankel used the words "outrage" and "travesty" -- words that the current record does not establish were used -- does not diminish the force of his point. It shows a reasonable observer's perception of Mr. Hynes' statement. Indeed, when Judge Frankel made this observation, it had not been learned that the statement had been carefully prepared days in advance.

Santobello. Fairly read, the Special Prosecutor's statement -- taken as a whole -- is simply not the sentencing recommendation that petitioner had bargained for in exchange for his constitutional right to a jury trial. The Special Prosecutor's obligation under paragraph 4 of the agreement was as follows:

The Special Prosecutor will recommend to the Judge of the New York State Supreme Court who will sentence Bernard Bergman on his plea of guilty to making unlawful payments to Albert Blumenthal that, in light of Bernard Bergman having voluntarily disclosed the facts of the crime to the Special Prosecutor and since the Federal Judge will know of these facts when he imposes sentence on the Federal charges, no sentence additional to that imposed by the United States District Court Judge on the federal indictment be imposed here. (emphasis added; A 58).

Instead of making that forthright and unambiguous recommendation and giving the agreed-upon reasons for it, the Special Prosecutor's sentencing "recommendation" consisted of a carefully prepared statement which is -- on balance -- extremely critical of petitioner. The "recommendation" portion of the statement consists, in its entirety, of the following remarks:

Since both items of the agreement have now been satisfied, I have the obligation to fulfill my commitment under the March 4th agreement and, your Honor, would recommend that whatever sentence you impose be a concurrent one with the Federal sentence imposed on June 17, 1976.

Having said this, however, I would like to add a further caveat. The process by which this office secured the agreement of the defendant, the cooperation in making restitution, has been an extraordinarily difficult one, and a complex one.

* * *

I made the recommendation that I was required to make. (A 53-5, 56; emphasis added). Nowhere in the statement are the agreed upon "reasons" given; nowhere is there any sense conveyed

that the prosecutor is making the recommendation with any "degree of advocacy." See United States v. Brown, 500 F. 2d 375 (4th Cir. 1974). The sentencing judge was correct when he noted that the Special Prosecutor "feels constrained." A feeling of constraint -- of grudging "obligation" and "requirement," rather than advocacy -- permeates the Special Prosecutor's statement.

Indeed, the district court below concluded that "there is no doubt that the Special Prosecutor's recommendation of no additional sentence was tepidly offered." (A 25). Moreover, it expressly found that "it did not literally comply with the plea agreement, in that he made no reference to the voluntary disclosures made by Bergman or the knowledge of the federal judge of such disclosures." (A 25). Having thus found that the "recommendation" complied neither with the letter nor with the spirit of the plea agreement, the district court nevertheless inexplicably concluded that the Special Prosecutor had not violated his agreement under the applicable case law. The district court acknowledged that the leading cases in both the Third and Fourth Circuits "might support the granting of the writ in this case." He also acknowledged that the majority opinion in Palermo -- the most recent interpretation of Santobello in this Circuit -- might require the conclusion that the Special Prosecutor had violated the plea bargain. But pointing to the unusual nature of the plea bargain in this case, he refused to apply the governing case law. But the case law -- in this and every other circuit -- is clear that the requirements of Santobello cannot be satisfied by a "tepidly offered" recommendation that the prosecutor "obviously was hopeful" the sentencing judge would reject and that did not, in any event "literally comply with the plea agreement."

The case law establishes that when a prosecutor has agreed to make a recommendation, he must use his "best efforts" to see that the recommendation is followed. See, e.g., Palermo v. Warden, Green Haven State Prison, 545 F. 2d 286, 294 (2d Cir. 1976); United States v. Brown, 500 F. 2d 375 (4th Cir. 1974); Snowden v. State, 365 A. 2d 321 (Ct. Spec. App. Md. 1976). In Brown, the Fourth Circuit stated that:

It is manifest that the consideration which induced defendant's plea was not simply the prospect of a formal recitation of a possible sentence, but rather the promise that an Assistant United States Attorney would make a recommendation on sentencing. This could reasonably be expected to be the sound advice, expressed with some degree of advocacy, of a government officer familiar both with the defendant and with his record and cognizant of his public duty as a prosecutor for the United States.

500 F. 2d at 377, emphasis in original.* In the instant case, there was no degree of advocacy whatsoever in the Special Prosecutor's statement; if any defense attorney had tepidly "advocated" a position with the reservations explicit and implicit in the Special Prosecutor's statement, his representations would surely be deemed ineffective assistance of counsel.

In United States v. Crusco, 536 F. 2d 21 (3d Cir. 1976), the prosecutor had agreed not to take a position on sentencing. At the sentencing hearing the prosecutor technically complied with the letter

*Even Judge Haynesworth, in dissent, agreed that the recommendation at issue "may be said to have been halfhearted." He also stated that if that was all the record reflected he "would agree with the majority. . ." He dissented, however, because "what transpired afterward" had "cured" the problems caused by the prosecutor's original statement. Whether one agrees or disagrees with Judge Haynesworth's analysis of the subsequent events, it is clear that the judges in Brown unanimously agreed that the original "recommendation" did not contain a sufficient "degree of advocacy" to satisfy Santobello.

of this agreement: he made "express declaration both at the beginning and at the conclusion of [his] remarks that [he] was leaving the sentencing decision to the judge. . . ." Id. at 25. And indeed, he made no sentencing recommendation and took no position on what sentence the judge should impose. But the prosecutor did make a brief critical response to certain comments made by the defense attorney during his plea for leniency. The comments made by the prosecutor were apparently accurate and it may well be that the defense attorney's statements were inaccurate or hyperbole. But, despite the prosecutor's technical compliance with the letter of the agreement, the Third Circuit unanimously reversed, holding that "only a stubbornly literal mind would refuse to regard the Government's commentary as communicating a position on sentencing." Id. at 26. "We believe that such a strict and narrow interpretation of [the Government's] commitment is untenable and we must reject it." Id. The parallel to this case is striking. Here, too, the prosecutor mouthed some words which he claims constituted technical compliance with the agreement. Here too, these words were surrounded by critical comments about the defendant. Accordingly, here too, the court should see through the prosecutor's "transparent effort" to communicate a message different from the one contained in his tepid effort to achieve technical compliance with the agreement.

A recent state case -- Snowden v. State, supra -- is also in point. In that case the recommendation was accompanied by the phrase "I believe we must." It was obvious to all concerned that the

prosecution "had agreed to the arrangement. . .perhaps with some feeling that although the State is recommending probation, it still might not be the best thing for all concerned." 365 A. 2d at 324. The Court of Appeals held that there had been a failure to comply with the agreement under Santobello, despite the sentencing judge's unequivocal declaration that the prosecutor's statements "had absolutely no bearing whatever, on my determination. . .". The court concluded that "such judicial adhesive cannot mend the prosecutor's broken promise." 365 A. 2d at 325.

The instant case presents a comparable situation, since one could possibly -- in fact, would virtually be compelled to -- read into Mr. Hynes' tepid statement "some feeling that although the State is recommending [this], it still might not be the best thing for all concerned." *Id.*

The most recent relevant case in this circuit, Palermo v. Warden, Green Haven State Prison, supra, presented, in a slightly different context, the issue of prosecutorial advocacy of a plea bargain. There the District Attorney's office had agreed to intercede on behalf of appellants in return for their cooperation, specifically by using their best efforts to secure minimal incarceration and early parole. Although the District Attorney did write a letter to the Parole Board supporting appellants request for early parole, his chief assistant expressed agreement with the contrary opinion voiced by a Bureau of Special Services official; the latter impressions were incorporated by the BSS into a memorandum circulated to several members of the Parole Board.

The Court of Appeals found this conduct to fall short of the degree of advocacy required by Santobello. In its view, "the prosecutor's office did not use even its best efforts to achieve utmost leniency from the Parole Board," 545 F. 2d at 294; the derogatory remarks which -- inadvertently, perhaps -- reached members of the Parole Board "certainly brin[g] into question the diligence with which the prosecutors intended to fulfill their part of the bargain," Id., and the District Attorney's letter "represented only a feeble effort to[ward] . . . achieving utmost leniency." Id.*

The advocacy requirement, while most clearly expressed in Brown, where the prosecutor was to make a particular recommendation, is also implicit in holdings by many courts respecting bargains requiring the prosecution to refrain from making a recommendation. In Commonwealth v. Alvarado, 276 A. 2d 526 (S. Ct. Pa. 1971) it was held that a prosecutor's promise to make no recommendation reasonably means a "commitment not to make any damning or even potentially damaging statements at the time of sentencing." 276 A. 2d at 529. This principle has been repeatedly affirmed; see United States v. Crusco, supra; People v. Kaanehe, supra; Miller v. State 322 A. 2d 527 (Ct. App. Md. 1974); Burroughs v. State, 354 A. 2d 205 (Md. App. 1976); Barnhart v. State, 368 A. 2d 1124 (Ct. Sp. App. Md. 1977); State v. Witte, 245 N.W. 2d 438 (S. Ct. Minn. 1976). Thus, even where a prosecutor agrees only to assume a position of neutrality, it must be studiously and carefully observed. This sort of "silent advocacy"

*The district court had determined that specific performance was the only meaningful relief available; the appellate court therefore ordered Palermo's unconditional release, since both his prison term and parole supervision term would have expired by this time. 545 F. 2d at 296.

is required to assure the defendant "what is reasonably due in the circumstance." Santobello, supra 404 U.S. at 262.

In the instant case, however, the prosecutor assumed a far greater burden by undertaking to present positively the case for not increasing Mr. Bergman's federal sentence.

In White v. Gaffney, 435 F. 2d 1241 (10th Cir. 1971), the petitioner in a habeas corpus proceeding invoked what was essentially a claim of aggravated failure of prosecutorial advocacy. Petitioner had pleaded guilty to second degree murder in exchange for a promise by the county attorney that he would recommend imprisonment for a term of years, and not life imprisonment. At sentencing, however, the prosecutor remained mute, and the court pronounced a sentence of life imprisonment. 435 F. 2d at 1243. As in most other cases on similar facts, the trial judge insisted that such a recommendation would not have affected his sentence. Id. at 1243-44. Following settled law, however, the Court of Appeals granted the writ, holding that:

[t]he question is not whether the promise was effective as to the court's decision, but whether it influenced White to make his decision to plead guilty.

Whether or not the recommendation would have been effective is immaterial. . .

Id. at 1244-45.*

*". . . it is the defendant's right which are being violated when the plea agreement is broken or meaningless. It is his waiver which must be voluntary and knowing. He offers that waiver not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court. If they are not adequate, the waiver is ineffective." Correale v. United States, 479 F. 2d 944, 949 (1st Cir. 1973).

White sheds considerable light on the case at bar, particularly when read in conjunction with Alvarado and others of its genre. Where the prosecutor is obliged to refrain from making a recommendation, he must avoid "even potentially damaging statements," Commonwealth v. Alvarado, supra, 276 A. 2d at 529. His "advocacy" obligation in such cases is effectively negative, i.e., he must remain absolutely neutral with respect to sentencing.

In contrast, where the prosecutor is obliged to present a recommendation, he must do so, White v. Gaffney, supra, and must do so with "some degree of advocacy," Brown, supra. The circumstances of the case at bar present a clear failure to meet this obligation: Mr. Hynes had a positive duty to present his recommendation with a measure of real advocacy; instead, he made what must certainly be considered "potentially damaging" statements in the form of a "caveat" to the court that petitioner had been uncooperative in the restitution negotiations, and that he was making the recommendation merely because he had an "obligation" to do so. His statements would have violated even a plea agreement requiring him to remain silent and neutral as to a sentence; it was clearly and prejudicially violative of a plea agreement which required him to argue affirmatively on behalf of petitioner.

The district court, while acknowledging that the sentencing recommendation here was "tepidly offered" and "did not literally comply with the plea agreement," offers three reasons for declining to follow the governing case law that admittedly requires the prosecutor to advocate the recommended sentence. The district court

argues that for the Special Prosecutor here to have advocated the sentencing recommendation he was obligated to make "would have been rank hypocrisy." (A 27). The district court expressly found that the Special Prosecutor "obviously was hopeful that the state [judge] would give a greater sentence."* But that is surely no excuse under Santobello and its progeny. In virtually all the litigated Santobello cases, the prosecutor disagrees with the sentencing recommendations he is obligated to make; it is precisely his obligation, under the governing case law, to make the bargained-for recommendation whether he agrees with it or not. In agreeing in advance to make a particular sentencing recommendation in exchange for a plea of guilty, the prosecutor is obligating himself to make that recommendation even if it may appear somewhat hypocritical for him to do so when the time comes.**

In Brown, the Fourth Circuit required the prosecutor to keep his real feelings from the sentencing court. In that case the prosecutor made the following sentencing recommendation:

Prosecutor: Well, Your Honor, in light of the plea bargaining agreement, the Government at this time is recommending three years incarceration, and we also recommend that if possible the Defendant be incarcerated at the Lorton Reformatory in Virginia.

The sentencing judge then asked the prosecutor "why" he was making the recommendation and the following colloquy ensued:

*"From a motive standpoint, you have established that [the Special Prosecutor] was extremely unhappy with the federal sentence and obviously was hopeful that the state would give a greater sentence." Tr 185-186.

**It is, in appellant's view, far from hypocritical for a prosecutor to suppress his personal feelings in fulfilling his contractual and constitutional obligations under Santobello.

Prosecutor: Well, Your Honor, that was part of the plea bargaining.

The Court: Not because you believe in it?

Prosecutor: Well, Your Honor, I do have some problems with that, anyhow, but that is the way I understand it.

The Court: Anything else?

Prosecutor: Nothing further.

500 F. 2d at 377.

Surely, the Brown prosecutor would have been acting hypocritically -- by the standards of the district court in this case -- if he had enthusiastically advocated a sentence he had "problems with." Nonetheless, the court concluded that he was obligated to do just that: to recommend the sentence as "the sound advice, expressed with some degree of advocacy," regardless of his own personal feelings.

In Crusco, as well, the Third Circuit required the prosecutor to remain silent even in the face of "hyperbole" by the defense counsel. The court ruled that by its agreement "the Government foreclosed any response. . . 536 F. 2d at 25-26, emphasis added.

If prosecutors want to feel entirely free to follow their conscience at the time of sentencing, then they should not enter into plea bargains which require them to advocate sentencing recommendations that may appear hypocritical to them at the time of sentencing. But once having made such an agreement -- in exchange for the defendant's constitutional right to a trial -- the prosecutor is not free to substitute a "tepidly offered" formal statement in place of the advocacy required by the governing cases, even if the required advocacy would appear to him to be hypocritical.

The second reason given by the district court for not applying the governing cases is that the state sentencing judge "knew from the beginning what the prosecutor's sentence recommendation would be, and the factors considered by the prosecutor in reaching that recommendation." (A 26). But that was true as well in the governing cases that the district court declined to follow. In Brown, Crusco, and Kaanehe, the sentencing judge knew precisely what the prosecutor was supposed to recommend. Indeed, in virtually every Santobello case -- starting from Santobello itself -- the sentencing judge has made a firm unequivocal statement that he was not in any way influenced by the prosecutor's recommendation or lack thereof.* Nonetheless -- and without doubting the truth of these statements -- the Courts have unanimously held that a prosecutorial violation of Santobello will not be cured by a judicial assurance of non-reliance on the prosecutor. As the Supreme Court stated in Santobello.

He [the sentencing judge] stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration.

* * * *

We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.

404 U.S. at 262, 263.

*In Santobello, supra, 404 U.S. at 259, the sentencing judge made the following statement:

Mr. Aronstein [Defense Counsel], I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do.

It is not surprising, therefore, that the district court was relegated to citing one lone dissenting authority in support of his view that the state sentencing judge's knowledge of the plea agreement obviated the prosecutor's obligation to advocate the sentence he had agreed to recommend (A 26). But the dissenting opinion in Brown -- which itself is distinguishable from the instant case* -- is not the law. The law as established by the Supreme Court and by the majority decisions in every circuit that has considered the issue is that a failure by the prosecutor to comply with his agreement to advocate a sentence will not be rendered harmless by the judge's knowledge of the agreement or by his assurance that he acted independently of the prosecutor. "[S]uch judicial adhesive cannot mend the prosecutor's broken promise." Snowden v. State, 365 A. 2d at 325.**

The third reason given by the district court for not following the governing cases -- especially Palermo -- is that the earlier case of "United States v. Podell, 519 F. 2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975) is much closer to the facts of this case." This is simply not so; Podell is factually inapposite. In Podell the district court had made a factual finding, which the Court of Appeals held "not clearly erroneous" that the plea rested "'principally and primarily and exclusively' on" Podell's desire to avoid automatic disbarment. The court found and the defense apparently conceded that "Podell's guilty plea must therefore stand since it rested in no significant degree on the Government's promise." 519 F. 2d at 148. Here it is beyond dispute that the plea rested almost entirely on the promise. While the district court here notes that certain

*See note * page 32 supra.

**Furthermore, the purpose of the prosecutor's recommendation is to take pressure off the judge -- that purpose is not served merely by the judge's knowledge.

considerations "motivated the defendant not to withdraw his plea" (A. 37), Podell and the other Santobello cases rest solely on the motivation for the plea and not on the motivation after governmental breach.

- C. The combination of the Special Prosecutor's press statements of June 17th with his in-court "recommendation" of September 14th constituted one of the most egregious violations of the letter and spirit of Santobello in the history of the case literature.

The egregiousness of the Special Prosecutor's Santobello violation cannot be fully appreciated without an understanding of the extraordinary political and media context of this case.* If there was to be a single reasonable sentence, the responsibility for it had to be shared by the sentencing judges and the Special Prosecutor, in light of the unique legal circumstances of the case. That is, obviously, why the agreement required that the prosecutor spell out the reasons why an additional state sentence would be deemed inappropriate. It was expressly contemplated that the Special Prosecutor would shoulder much of the responsibility for the state sentencing judge's imposition of no additional time. That was a political reality for which petitioner had bargained: the Special Prosecutor would take whatever "flack" would be forthcoming, since it was he who recommended that no additional time be imposed and since "history and legal tradition impels a court to give a Prosecutor's recommendation for a lesser sentence great weight." (Judge Melia's sentencing statement, Pet. Ex. 4, p. 70). The district court apparently recognized that "one of the purposes of the recommendation was to shift the responsibility for what might have been a politically unpopular

*See Judge Ward's finding in this regard at p. 51 of the transcript of July 11, 1977. See also Pet. Ex. 3 and 24.

sentence from the judge to the Special Prosecutor." (A 27).

The very essence of this agreement was irretrievably torn asunder by the deadly combination of the June 17th and September 14th statements. Indeed, the very essence of the written agreement -- even without regard to the realistic context of this case -- was destroyed by that combination of statements. The press statement of June 17th made it crystal clear to the press and to the public that Mr. Hynes did not agree with the federal sentence of four months; it certainly made it crystal clear that he would not be satisfied if the four month sentence was the only jail sentence petitioner were to receive. Hynes made it clear that he regarded four months in jail for a "man such as Bernard Bergman" as disappointing, insubstantial, special justice for the privileged, essentially unjust, and "adversely affect[ing]" his continued investigations. This is simply not the statement of a man who is supposed to be shouldering the public responsibility for recommending that this very four month sentence should also be imposed concurrently by the state judge. If the state judge were to impose a four month concurrent sentence following the wide public dissemination of the Hynes' criticism, then it would be the state judge himself who would have to shoulder the public responsibility for imposing such a controversial sentence. That was simply not the bargain that petitioner struck in this case! He did not agree to waive his valuable constitutional rights in exchange for the possibility that a politically vulnerable Criminal Court Judge sitting as an acting Supreme Court Justice might impose a sentence that the prosecutor had -- in advance -- characterized to the public and the press as "insubstantial," etc.

Once the Special Prosecutor had issued his premediated press statement of June 17th, it would have been difficult indeed -- if not impossible -- to right the wrong he had caused. As Chief Justice -- then Circuit Judge -- Burger once put it: it is impossible to "unring the bell" once it has been rung. Miller v. United States, 320 F. 2d 775 (D.C. Cir. 1963, dissenting opinion). But whatever slim chance there might have been to "unring" the premediated press statements of June 17th by an unequivocal and forthright advocacy statement on September 14th was deliberately dashed by the Special Prosecutor's calculated sentencing statement. A prosecutor intent on complying with his agreement under Santobello would have made a sentencing recommendation which the press, the public and the judge would have to interpret as unequivocally advocating that no additional time be imposed. A considerable amount of time, thought, and effort went into the sentencing statement; indeed, it can fairly be said that no reported case reveals a more calculated and carefully prepared sentencing statement reflecting as much input from so many sources, including press aides and lawyers (see pp. 10-11, supra). If Mr. Hynes had really wanted to try to undo the problems caused by his press statements, he could clearly have set out to try to do so. The record plainly establishes that at the time the sentencing statement was in preparation, Mr. Hynes had in mind his earlier press statements: Mr. Hynes testified that one of the reasons why no press statement was prepared for the contingency of an inappropriately low sentence by Judge Melia -- i.e., the sentence that Mr. Hynes was supposed to recommend -- was because of the criticism he had

received for his press statement of June 17th (Tr 1467-68). One of the drafts presented to Hynes for his consideration -- indeed, the draft from which he borrowed heavily -- contained an explicit reference to his previous press statement: "That sentence was four months in jail. My feelings in regard to that sentence are a matter of record [sic], and I will not repeat them here." (Pet. Ex. 13-C, p. 2). There was also testimony that the issue of compliance with the agreement was discussed on the evening prior to the sentencing (see pp. 10-11, supra). Accordingly, with his press criticism of the four month sentence clearly in his mind and with the benefit of press and legal advice which included consideration of compliance with the agreement, the Special Prosecutor made a calculated decision not to attempt to remedy the problems caused by the earlier press criticisms of the four month sentence. Instead of leaning over backwards to be as forthright an advocate of the four month sentence as he was capable of being -- instead of using his "best efforts to achieve," Palermo, supra, 545 F. 2d at 254, the four month sentence -- he issued a statement filled with criticisms and caveats and containing a begrudging and "tepid recommendation" which expressly reflected his "obligation" rather than his advocacy. No person who knew of Mr. Hynes' earlier press criticism of the four month sentence could possibly understand his sentencing statement to reflect a genuine desire that Judge Melia should actually impose a four month concurrent sentence. Indeed, it was apparent to the district court during the hearing that Hynes was hoping that Judge Melia would reject his

recommendation and would impose an "appropriate" sentence rather than the "inappropriate" sentence imposed by Judge Frankel (hearing at 185-6). We submit that it was apparent to any observer -- at the time of sentencing -- that the totality of Mr. Hynes' statements on sentencing did not constitute genuine advocacy of a four month sentence.

It might be argued that Hynes did all he could reasonably do on September 14th in light of his previous press statements; that his press criticisms of the four-month sentence did not really permit him to make so dramatic a public "about-face" and now come into court and say that the four month sentence was the appropriate, just and correct sentence. Indeed, the district court, while recognizing that the prosecutor's performance was "perhaps not all that it should have been," concluded that "it would have been rank hypocrisy" for the Special Prosecutor to have "attempted a glowing endorsement of the sentence recommendation at [the time of sentencing]." But whatever feelings of uncomfortableness -- personal or political -- might have been felt by the Special Prosecutor in making such an about-face, the entire dilemma was created by his deliberate decision to criticize the Frankel four month sentence. He had an alternative -- the alternative that prosecutors follow all the time: a response to the press of "no comment," with an accompanying explanation that prosecutors do not comment to the press about ongoing matters that are sub judice. As the district court concluded, he was not compelled -- or indeed ever permitted -- by his "obligation to inform the public," to engage

in "totally unwarranted and improper behavior" that was "manifestly contrary to state law." (A 33). As the court in Snowden put it, the prosecutor "might do well to contemplate a reflection of Publilius Syrus in the first century, B.C.: "I have often regretted my speech, never my silence." 365 A. 2d at 325.

- D. The Special Prosecutor's position on petitioner's request for a reduction of the state sentence -- as reflected in the Special Prosecutor's written and oral submissions -- constitutes an independent violation of Santobello.

The Special Prosecutor committed independent breaches of his plea bargain by the positions he took after the state sentencing judge failed to follow his tepid "recommendation" and imposed an additional and consecutive one year sentence. On appeal, the Special Prosecutor vigorously opposed any reduction of sentence. More significantly, when petitioner sought a reconsideration and reduction of sentence before the state sentencing judge, the Special Prosecutor did not -- at the hearing on reconsideration -- recommend that the judge exercise his discretion to reduce the one year sentence so that it would not be "additional to that imposed" by the federal judge. Instead, while raising certain legal arguments, he also vigorously opposed the relief sought by petitioner and recommended that the one year consecutive sentence not be reconsidered or reduced. E.g., Mr. Hynes in oral argument on the motion to reduce condemned petitioner noting:

Those who steal with a pen carefully weigh the benefits that will accrue against the chances of being caught and punished and give never any thought to the suffering it causes others.

(Pet. Ex. 8 at p. 55)

The case law is clear that a prosecutorial agreement to recommend a particular sentence requires that where the sentencing judge did not follow the prosecutor's recommendation at the original sentencing hearing, the prosecutor must continue to make that recommendation at a hearing to reduce the sentence. In United States v. Ewing, 480 F. 2d 1141 (5th Cir. 1973), this precise issue was decided by the court. In that case, the prosecutor had agreed not to oppose a probationary sentence. At the original sentencing hearing "the Government fulfilled its promise," but the sentencing judge refused to grant probation. Subsequently, the defendant "filed a motion for the reduction of sentence pursuant to Rule 35." During the Rule 35 proceeding, the prosecutor opposed a reduction of sentence and none was granted. The court held that the Government's position at the Rule 35 proceeding constituted a failure "to keep its part of the bargain." 480 F. 2d at 1143. The court's reasoning -- which is dispositive of the instant case -- was as follows:

Our case is almost identical to Santobello except for the fact that the prosecution fulfilled its commitment at the initial sentencing hearing only to breach it at the subsequent hearing on Ewing's Rule 35 motion for the reduction of sentence. But this distinction is of little import because both of these proceedings were integral parts of the sentencing process in this case. Surely when Ewing obtained the Government's promise not to oppose probation in exchange for his plea of guilty, he did so in the expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence. The Government was obligated to fulfill its commitment at least until the question of Ewing's sentence was finally resolved by the sentencing judge.

In the instant case as well, the Special Prosecutor "was obligated to fulfill [his] commitment at least until the question of [Bergman's] sentence was finally resolved by the sentencing judge." The record of this case establishes that the Special Prosecutor refused to fulfill his commitment at the hearing to reduce petitioner's sentence. To the contrary, he affirmatively recommended that the one year consecutive sentence not be reduced.

The district court seeks to distinguish Ewing on the following ground:

Petitioner erroneously argues that Ewing controls here. His error lies in that the Rule 35 motion for reduction of sentence was addressed to the discretion of that federal court. In this case, the motion in state court was opposed by the prosecutor on jurisdictional grounds. He took the position that any reduction of sentence, following its affirmance by the New York appellate courts, would act as an unwarranted interference with completed judicial proceedings. See *People v. Ozarowski*, 87 Misc. 2d 607, 385 N.Y.S. 2d 727 (Sup. Ct. 1976). In other words, the issue before Justice Melia on that motion was whether petitioner had standing to raise, and the court had jurisdiction to hear, his arguments. As such, the prosecutor's opposition to the motion was not inconsistent with his sentence recommendation, but rather was a legitimate legal argument against the challenge to the sentence in that procedural context. (A 29).

But this purported distinction entirely misses the point of petitioner's argument. There were two issues before Judge Melia on the motion for sentence reduction: (1) whether, under New York law, the court had jurisdiction to reduce the sentence and (2) whether -- if the court did have jurisdiction -- it should exercise its discretion and reduce the sentence. The district court here considered only the Special Prosecutor's position in relation to the jurisdictional point; it

simply ignored the gravamen of petitioner's contention: that the Special Prosecutor was obligated under Ewing to recommend that, if the court concludes it has jurisdiction to reduce the sentence, it should reduce it to four months concurrent with the federal sentence. At the very least, it should not have opposed -- as it surely did -- any discretionary reduction in the sentence. Indeed, during the course of the state court hearing on sentence reduction, the state sentencing judge at the outset stated that the motion was being entertained on the merits (see Pet. Ex. 8 at pp. 10-11). Nonetheless, Mr. Hynes and Mr. Bourgeois argued strenuously for at least twelve pages that discretionary relief should not be granted.

Accordingly, this case is not distinguishable from Ewing. The record plainly shows that the Special Prosecutor's position in opposition to sentence reduction was not limited to "jurisdictional," "procedural," or "legal" arguments; it impermissibly extended as well to any discretionary reduction.

II. On the Record of this Case, Petitioner did not Waive His Constitutional Claim under Santobello.

It is hornbook law that the prosecution has an extremely heavy burden of proof in seeking to establish that a criminal defendant has waived a constitutional right. See Gates v. Henderson, ___ F. 2d ___, slip op. 5361 (Aug. 19, 1977, 2d Cir.) (en banc). Courts have repeatedly stated that "presuming waiver [of a constitutional right] from a silent record is impermissible" and that "every reasonable presumption must be indulged against waiver." See e.g., Carnley

v. Cochran, 369 U.S. 504, 516 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938); Brookhart v. Janis, 384 U.S. 1 (1966); United States v. Harris, 498 F. 2d 1165 (3d Cir. 1974).

In the context of a broken Santobello agreement, courts should not find a waiver in the defendant's failure to seek to withdraw his guilty plea unless the defendant could, by withdrawing his plea, have restored himself to the same position he would have been in had he not entered into the agreement and pleaded guilty. Numerous cases have held that withdrawal of the guilty plea would not be an adequate remedy where such withdrawal would place the defendant in a worse position than he had been in prior to the agreement. See e.g., United States v. Carter, 454 F. 2d 428 (4th Cir. 1972); Palermo v. Warden, *supra*; Jordan v. Commonwealth, 217 Va. 57, 225 SE 2d 61 (1976), *a fortiori*, from these cases that a defendant is not compelled -- at the risk of waiver -- to seek to withdraw his guilty plea and rescind the agreement where he cannot be restored to the status quo ante by such a result.* Any contrary rule would permit -- indeed, encourage -- prosecutors to enter into plea agreements, and then break them after the defendants had irretrievably prejudiced themselves in reliance on the agreement. If the defendants were then required -- under the threat of waiver -- to withdraw the plea and rescind the agreement, the prosecutor would have everything to gain and nothing to lose by entering into such agreements.

*The *a fortiori* nature of this conclusion follows from the fact that when a judicial remedy is being sought after the fact, the court has certain powers to create equity by construing the law to achieve that result; when a defendant and his counsel must make an often hasty decision during the process of implementing the bargain, complex legal determinations generally have to be made without the aid of the courts.

In order to prevail on a waiver agreement under Santobello, the prosecutor must meet a heavy burden of proving by means of record evidence that: (1) the defendant, advised by counsel, made a knowing and calculated decision to forego the option of withdrawing his guilty plea (see Gates v. Henderson, supra); and (2) that by withdrawing the guilty plea and rescinding the agreement, the defendant could have been restored to the legal and factual situation he would have been in prior to the guilty plea and the agreement, and that he was in no way prejudiced by actions he took pursuant to the agreement. Cf. Garrity v. New Jersey, 385 U.S. 493 (1966); Leary v. United States, 395 U.S. 6, 28-9 (1969).

The prosecution's record in this case is absolutely "silent" in this regard. See Carnley, supra. The Special Prosecutor presented no affirmative evidence on these issues. They repeatedly asked for any memoranda in the files of the defense that might establish "waiver" and were repeatedly assured that there were none. All the evidence in this case is to the contrary. Petitioner's defense attorneys sought to remedy the Special Prosecutor's breaches as they occurred in every reasonable way -- other than by withdrawing the guilty plea and the agreement. E.g., Mr. Lewin's May 26, 1976, letter to Mr. Bourgeois, Pet. Ex. 9-B; Mr. Lewin's statement before Judge Melia on June 17, Pet. Ex. 4, pp. 25-28; Mr. Lewin's request to Judge Frankel to delay the imposition and execution of federal sentence (Tr 433-4).

The reasons why they did not -- and could not -- withdraw the guilty plea and rescind the agreement are plainly established by

the record. Bernard Bergman had acted irretrievably and prejudicially in reliance on the agreement: he had incriminated himself in a crime that the Special Prosecutor could not have proved without the evidence he had provided (see, e.g. Tr 1358-9); he had pleaded guilty to that crime and to others to the accompaniment of banner headlines in every New York media; he had agreed to a civil liability figure well in excess of what he and his accountants (and, apparently, Judge Frankel) believed he owed; and he had actually signed over to the State all of his and his wife's assets.

The Special Prosecutor contends that if petitioner had withdrawn his plea and rescinded the agreement, then none of the evidence he provided the Special Prosecutor or its fruits could have been used against him in any subsequent proceeding.* The Special Prosecutor not only has the heavy burden of showing that this is clearly correct as a matter of law, but he also has the burden of proving that Mr. Bergman and his lawyers were aware of this as a matter of fact. The trial court concluded that "after extensive briefing,** the best that can be said for the relevant New York law on this subject is that it is unsettled." (A 28). This conclusion would seem to be dispositive against the Special Prosecutor's waiver contention. A defendant cannot be expected to rescind an agreement -- under the threat of waiver -- without an assurance that he will not thereby be irretrievably prejudiced; obviously, no such assurance can be predicated on admittedly "unsettled" law.

*The Special Prosecutor has not specified whether this would include civil proceedings as well. For example, petitioner lost his license to operate nursing homes as a result of the pleas of guilty. It is certainly not clear whether the evidence provided by petitioner could not be used against him in a license revocation or other civil proceedings if he were to have withdrawn his plea and rescinded the agreement.

**Petitioners brief on this subject is available for the court. Record on appeal document No. 7.

In an effort to avoid the impact of this conclusion, the district court engages in an incredible display of "Monday morning quarterbacking." He argues that despite the unsettled law,

the motion to withdraw the plea could have been joined with a motion to suppress the Grand Jury testimony, with the explicit notation that the two were mutually dependent, so that unless both were granted neither would be sought. The Bergman forces, apparently for strategic reasons, did not pursue this course. (A 28).

There is no evidence that the "Bergman forces" ever considered this convoluted option, suggested by the district court for the first time in his opinion.*

Bernard Bergman cannot be found to have waived an important constitutional right because his lawyer did not think of the "imaginative" -- if not imaginary -- option that occurred first to the trial court after weeks of litigation. See Curtis Publish. Co. v. Butts, 388 U.S. 130, 144-5 (1967).

Moreover, a closer look at this conditional motion option reveals that it is far more complex than the trial court realized. There would have had to be a series of motions each conditional on the granting of the others. There would have had to be a motion in federal court to withdraw the federal plea "with the explicit notation" that it is being made conditional on the granting of all parts of the conditional motions in the state court to withdraw the state plea only if the evidence were also suppressed, which -- in turn -- were conditional on the granting of the federal motion. The degree of cooperation, good will, and timing -- involving three parties and

*Even the Special Prosecutor never suggested that this kind of conditional motion could have been attempted.

two courts -- that would have been required to pull off this complex operation boggles the imagination. All experienced attorneys know that courts do not favor conditional motions -- even simple conditional motions. To find waiver by Mr. Bergman in his lawyer's failure to have anticipated and implemented the district court's tardily conceived of ligation scenerio would do violence to the law of constitutional waiver and would not comport with the spirit of this Court's decision in this area. See Gates v. Henderson, supra.

Nor is there a scintilla of evidence in this case even suggesting that Mr. Bergman or his lawyers believed -- or had reason to believe -- that the evidence provided by Mr. Bergman and its fruits would not or could not be used against him if he withdrew his plea and rescinded the agreement. Indeed, Assistant Special Prosecutor Wilson testified that he never informed Mr. Bergman or his lawyers that such evidence and its fruits could not or would not be used. If that was their formal position, they were obviously obligated to inform the defense of this in writing, especially since they were on notice that Mr. Lewin was considering various responses to what he perceived as serious breaches by the Special Prosecutor. It comes with particular ill grace for the Special Prosecutor now to tell Mr. Bergman for the first time that they would not have used the evidence had he rescinded the agreement, and to argue that his failure to devine this in advance constitutes a waiver of his constitutional rights.

Moreover, the Special Prosecutor has not even attempted -- to date -- to demonstrate or even allege that Mr. Bergman's actions in signing over his and his wife's assets and in admitting civil liability of \$2,500,000 would be voided if the agreement were rescinded. Nor has he explained how the "bell" of his guilty plea -- a bell whose ring was heard in every New York home -- could be "unrung" by its withdrawal. Prior to that public admission of guilt to some crimes, Bergman had consistently asserted his total innocence -- and he had lie detector test results to prove it (Tr 1387). Once the guilty plea was entered and flashed across every television screen and newspaper headline in the City, Mr. Bergman could no longer proclaim his innocence. There are grave doubts, as well, whether he could have secured a jury that was not aware of his guilty plea.

The best evidence of the unequal positions the parties were in after the agreement was signed and the plea entered is provided by considering the enhanced position of the Special Prosecutor before sentence as compared to before these events: the Special Prosecutor now had a public admission of Bergman's guilt as to at least some crimes; his evidence and its fruits regarding several public officials, as well as Mr. Bergman; his admissions of \$2,500,000 in civil liability; and a stipulation signing over to the State all of Mr. and Mrs. Bergman's assets. Why shouldn't the Special Prosecutor want to breach the agreement at this point and hope that Bergman would rescind it?

The record clearly establishes that by the time the Special Prosecutor began to breach the agreement, it was impossible -- as a matter of fact and law -- for the petitioner to withdraw the guilty plea and rescind the agreement without suffering irremediable harm by the actions he had taken in reliance on that agreement. Surely the Special Prosecutor has not satisfied his extremely heavy burden of proving from record evidence that petitioner could have been restored to the status quo ante by withdrawal and rescission at the relevant times. Accordingly, no waiver of petitioner's constitutional rights under Santobello can be found on the record of this case.

Even if all doubts were to be resolved against Mr. Bergman and in favor of the Special Prosecutor's waiver contention, the most that could be concluded is that Mr. Bergman waived the one particular remedy he did not seek before imposition of the state sentence: namely, withdrawal of the guilty plea. But he is not seeking that remedy now! It has always been Mr. Bergman's position that the remedy of plea withdrawal could not -- once he had publicly admitted his guilt and provided other irretrievable evidence -- return him to the status quo ante his plea of guilty.* The remedy he now seeks -- specific performance of the expected result -- was never waived. At each and every point in the process, Mr. Bergman sought that result and objected to the Special Prosecutor's violations of the agreement (see e.g., Pet. Ex. 9-B, Pet. Ex. 4 at

*The district court expressly recognized this in his opinion: "He does not now, nor has he ever, expressed a desire to withdraw the plea." (A 20).

pp. 25-8; Tr 433-4). To find a waiver of a constitutional right by a defendant's refusal to seek a particular unsatisfactory remedy would confuse analysis, create an injustice, and encourage prosecutors to violate their solemn plea bargains in the hope and expectation that they would thereby benefit considerably.

As the Supreme Court stated in Garrity v. New Jersey, supra, 385 U.S. at 498:

"Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.

"'it always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' Ibid." [Union Pac. R.R. Co. v. Public Service Comm., 248 U.S. 67, 70].

III. The Remedy

Appellant in this case has from the beginning sought the precise remedy that the Special Prosecutor originally proposed and agreed to: the Special Prosecutor and his assistants testified that they were entirely satisfied with an agreement that guaranteed that the state sentence would not exceed whatever sentence the federal judge imposed and would be concurrent with it (Tr 844-7; A 6). Indeed, it was the Special Prosecutor's office that originally proposed the "single sentence" solution to the double jeopardy dilemma posed by the overlapping indictments (Tr 842-3). To be sure, the final agreement provided -- at least in theory* -- for something less: namely, that

*footnote on following page

*(footnote from previous page)

Judge Melia did formally state -- prior to the agreement of March 4, 1976, being signed -- that he was not bound by the agreement. But he also stated repeatedly both to petitioners and his counsel that he "ordinarily" accepts the recommendation of the prosecutor and -- more importantly -- that he sees "no reason to believe that [he] would not do so here." (Pet. Ex. 4, p. 17). The record also establishes that prior to the Bergman case, Judge Melia had never -- to his recollection -- failed to follow a prosecutor's recommendation for a reduced sentence. It is in precisely this kind of context that courts have said that defendants are entitled to rely on the expectation that the judge will, in fact, follow the prosecutor's recommendation. As the New Hampshire Supreme Court recently observed:

The defendant may reasonably infer from the court's past practice that the court will follow the prosecutor's recommendation. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 48 (1966). The prosecutor will frequently encourage this expectation in order to strike a bargain. The court may state and the defendant may understand that the court is not legally bound to accept the recommendation. But the court's warning of what it can do does not inevitably affect the defendant's expectation of what it will do. It would be unfair to hold the defendants to their pleas when their reasonable expectations, which were induced by the prosecutor and by past practice and which led to their pleas, have proven false. State v. Thomas, 61 N.J. 314, 321-322, 294 A. 2d 57, 61 (1972); Commonwealth v. Zuber, Pa. 353 A. 2d 441, 443 (1976); United States v. Hammerman, 528 F. 2d 326 (4th Cir. 1975).

State v. Goodrich, 363 A. 2d 425, 426 (1976). See also ABA Standards Relating to the Function of the Trial Judge, §4.1(c)(iii) (Approved Draft 1972), and the commentary relating thereto. See also United States ex rel Culbreth v. Rundle, 466 F. 2d 730 (3d Cir. 1972); United States v. Resnick, 483 F. 2d 354, 358 (5th Cir. 1973); Illinois Supreme Court Rule 402(d)(2) (1970), Ill. Rev. Stat. 1973, ch. 110A, §402(d)(2).

Moreover, the state judge in this case -- by his subsequent actions -- implicitly bound himself to impose the recommended sentence if the petitioner resolved his civil liability to the satisfaction of the Special Prosecutor. It was unfair in the extreme for Judge Melia unilaterally to add a condition to the written agreement and then when that condition was not met -- as the Special Prosecutor acknowledged, it was on September 14th -- nevertheless impose a sentence in excess of the agreed upon recommendation. It is clear that Judge Melia's repeated references to "restitution" reasonably led petitioner and his counsel to expect that Judge Melia would surely go along with the agreed upon recommendations if the restitution issue were resolved to the Special Prosecutor's satisfaction. The state sentencing judge simply cannot have it both ways: he cannot involve himself as intimately and as forcefully as he did here in attempting to exact from petitioner what he regarded as compliance with the agreement and -- at the same time -- remain aloof from that part of the agreement on which the petitioner relied.

the Special Prosecutor would explain to the judge why a single concurrent sentence was proper and would recommend that the judge impose no additional prison time.

The district court has found -- in the most understated phrase in his opinion -- that the Special Prosecutor's performance was "perhaps not all that it should have been." More specifically, the district court concluded that: (1) the Special Prosecutor's "emotional" attack on Judge Frankel's sentence -- the very sentence he was obligated to advocate -- "was clearly and totally unwarranted and improper" and that it was "manifestly contrary to state law" (A 33); (2) that the Special Prosecutor -- from a motive standpoint -- "obviously was hopeful that the state would give a greater sentence" (Tr 185-186); and (3) that the Special Prosecutor's in-court sentencing recommendation "was tepidly offered" and "did not literally comply with the plea agreement." (A 25).

The district court also acknowledged that there "is some authority. . .for substituting the desired result in place of the prosecutor's promise, in unusual circumstances, where meaningful relief can be offered in no other way. See, e.g., Palermo v. Warden, Green Haven State Prison, 545 F. 2d 286 (2d Cir. 1976); Correale v. United States, 479 F. 2d 944 (1st Cir. 1973); United States v. Carter, 454 F. 2d 426 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974)." (A 20-1). It is appellant's contention -- elaborated below -- that the cases cited by the district court, and others, require some effective remedy for the admittedly egregious wrongs committed by the prosecutor. The most effective remedy -- the only one that will assure that the Special

Prosecutor does not benefit from his deliberate and premeditated wrongdoing -- is vacation of the state sentence and a remand to the state courts with directions to impose no sentence additional to that imposed by the federal court. Another possible remedy -- admittedly less satisfactory but preferable to no remedy at all -- would be to vacate the sentence and remand it for resentencing before another judge following a genuine prosecutorial recommendation (as distinguished from the admittedly tepid one made here).*

In Santobello itself the court noted two permissible remedies to be chosen between on remand: "the opportunity to withdraw his plea" or "specific performance of the agreement" which meant that "petitioner should be resentenced before a different judge" to whom the appropriate recommendation would be made. 404 U.S. at 263. However, it must be remembered that in Santobello the defendant had not served any of the sentence since he had been released on bail from the date of the conviction. 404 U.S. at 260. Accordingly, the Supreme Court did not have any reason to determine whether other remedies were appropriate. See Correale v. United States, supra.

*Appellate sought the latter remedy from the district court as an alternative in the event that the primary remedy was refused. In his brief at page 79, he stated:

At the very least, Judge Melia's tainted sentence must be vacated and the petitioner resentenced before another judge following a genuine prosecutorial recommendation. Although petitioner would not regard resentence as satisfying his constitutional rights, he would, of course, regard it as preferable to no relief at all.

In Correale v. United States, the court, on considering a federal conviction attacked pursuant to 28 U.S.C. §2255, was confronted with a state-federal plea bargain. The defendant there had been sentenced in state court to a term of from four to eight years. Nine months later the defendant pleaded guilty in federal court and some five months after that was sentenced. The plea bargain recommendation which induced the plea was "that, at a minimum, the United States Attorney promised to make a recommendation that the court impose [in federal court] a sentence that would be effectively concurrent with the state's sentence that he [Correale] was then serving, meaning primarily that he would be eligible for federal parole at the time that he was paroled by the state authorities." At sentencing, the United States Attorney recommended the imposition of from four to eight years to be served concurrently. The federal judge imposed a sentence of five years under 18 U.S.C. §4208(a)(2). The First Circuit reversed the order denying relief, over the prosecutor's claim that the unfulfilled promise was "harmless because judicial refusal to follow the recommendation or judicial awareness of propriety." 479 F. 2d at 949. The court, in evaluating the appropriate remedy to be granted, concluded:

"It seems to us hollow to remand for resentencing before another judge who will hear a recommendation that the federal sentence, including parole eligibility, be effectively concurrent with the state sentence which has already been served and as to which parole has already been granted fourteen months earlier."

To avoid that "hollow" remedy, the court held that:

"We believe that the only just remedy and the only one which could now approximate specific enforcement of the agreement is a resentencing to the same term, execution of sentence to be suspended and the appellant placed on probation." 479 F. 2d at 950.

That is in essence the remedy which Mr. Bergman seeks in this Court.

In Palermo v. Warden, supra, this Court demonstrated the flexibility available to a federal court confronted with a state Santobello violation. The district court found that the defendants had been induced to plead guilty by a specific promise by the prosecutor that he would be paroled from state prison on an unrelated conviction in another county after serving twelve months in prison. The state district attorney lacked the power, under state law, to make such a promise. "Clearly, then, Santobello requires relief when the prosecutor fails to fulfill promises" even when they are unfulfillable. 545 F. 2d at 296. The court affirmed the district court determination "that specific performance of the plea bargain would constitute the only meaningful relief in the context of this case." Ibid.

"We cannot conclude that the District Court erred in determining that specific performance was the proper remedy in this case. Palermo had already been incarcerated for the entire promised prison sentence and parole term. Remand for withdrawal of the guilty plea would indeed have been meaningless as the court below found." Id. at 297.

Similarly, the Court of Appeals for the Fourth Circuit, en banc, in United States v. Carter, 454 F. 2d 426 (4th Cir. 1972), held that if the promise that induced the guilty plea in the District of Columbia was that the defendant would not be prosecuted anywhere for any crime relating to the checks which he had pleaded guilty to stealing, then the appropriate remedy would be the dismissal of the subsequent indictment in the federal court in a different district for forgery and conspiracy.

Also, in United States v. Minnesota Mining & Mfg. Co., 551 F. 2d 1106 (8th Cir. 1977), the Eighth Circuit dismissed a criminal tax fraud indictment against a corporation and its officers where they had previously, in reliance on the Watergate prosecutor's promise of immunity from future criminal prosecution, including certain criminal tax prosecution, provided information and pleaded guilty to a violation of 18 U.S.C. §610 misdemeanor. The court found that the breach of a promise "the inviolability of which rested completely in the province of the government's prosecutors" required the drastic relief of dismissal of the pending charges.

A similar rule, granting effective specific performance, has been applied in state cases even though the prosecution would not, in the first instance, have had the power to have bound the state judge who imposed the sentence.

In Commonwealth v. Alvarado, 442 Pa. 516, 276 A. 2d 526 (1971), the Supreme Court of Pennsylvania granted a resentence to give the defendant the benefit of his bargain. The defendant had pleaded

guilty to the crime of murder based upon an understanding that the prosecutor promised not to seek the death penalty. However, at the sentence proceeding, while never specifically or expressly recommending the death penalty, "neither did he stand mute." The prosecutor described the crime as "vicious" and made remarks such as "would he [the defendant] show any mercy to this girl [the victim]?" The court concluded that "the only conceivable purpose of the references to the brutal nature of the crime and to Alvarado's apparent remorselessness was to persuade the court to assign the harsher of the two possible penalties." 276 A. 2d at 529. The court determined the contents of the plea bargain by "what the defendant might have reasonably interpreted it to be." Under that interpretation the court found "that promise was clearly violated." Although not explicitly choosing between one of the established alternative remedies for a Santobello violation, the court found an "appropriate disposition" and modified the sentence to life imprisonment. The court gave the defendant the benefit of the bargain by modifying the sentence in accordance with the prosecutor's promise. "In Pennsylvania, it is well settled that 'where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain.'" Commonwealth v. Zakrzewski, 460 Pa. 526, - , 333 A 2d 898 900 (1975) (emphasis added)." Commonwealth v. Zuber, 353 A. 21 441, 444 (1970).

In Commonwealth v. Zuber, supra, the defendant had been paroled on an earlier sentence unrelated to the murder charge before the court. At the time of his plea of guilty there had been a specific

recommendation of a seven to fifteen year sentence and that the prosecution would join in a request to the Parole Board the new sentence run concurrently with the time still owed on the prior sentence. The Supreme Court of Pennsylvania found that at the time the promise was made the court lacked the power to impose such a concurrent sentence. The court found that "the appropriate remedy instantly is to provide appellant with the benefit of his bargain." 353 A. 2d at 443. The court modified the sentence so as, in effect, to take into effect the concurrent time. "By so doing appellant will then have received 'the benefit of the bargain' made with the Commonwealth and still serve a prison sentence commensurate with the term contemplated by all of the parties to the plea proceedings. We agree that a sentence modification such as that suggested by the appellant affords the most appropriate remedy." Id. at 446.

In Jordon v. Commonwealth, 217 Va. 57, 225 S.E. 2d 61 (1976) the Supreme Court of Virginia granted the dismissal of an indictment because "we are powerless to restore the parties to the position they occupied at the time of the preliminary hearing." The defendant had been arrested and was originally charged with breaking and entering with intent to commit larceny and robbery. As a result of negotiations with the prosecution during the preliminary hearing the warrant was amended to add an assault and battery count to which the defendant pleaded guilty and, pursuant to the agreement, was sentenced to a period of twelve months in jail with four months suspended. The defendant served his term of imprisonment. "Thereafter, and apparently following some public criticism of the manner in which the case had

been concluded," the defendant was indicted for burglary and subsequently was tried, convicted, and sentenced to ten years in prison. "The narrow issue before us here is whether the Commonwealth of Virginia shall be held to abide by the terms of a promise made to the defendant." The court concluded that the Commonwealth was so bound but noted the difficulty in restoring the parties to their pre-preliminary hearing positions:

"Following the plea bargain, Jordon entered a plea of guilty to assault and battery. By so doing he admitted his presence at the scene of the burglary and robbery and admitted, although to a lesser degree, his involvement. This action very effectively frustrated any defense that he might have interposed to the warrant or any subsequent indictments for offenses embraced within the warrant. Further, the defendant accepted the judgment of the district court and served the term of imprisonment imposed upon him. He has fully performed his part of the agreement, and no order that we can enter will undue that performance or restore him to the status he occupied on the day of his preliminary hearing." 225 S.E. 2d at 664; emphasis added.

The analogy with the case at bar is obvious. Similarly, in Jones v. Commonwealth, 217 Va. 248, 227 S.E. 2d 701 (1976). The Supreme Court of Virginia modified a sentence so as to grant the defendant the benefit of the bargain which he had made with the prosecutor.

Similar remedies of effective specific performance have indeed been granted long prior to Santobello. See, e.g., Harjo v. State, 106 P. 2d 527 (Crim. App. Okla. 1940); Courtney v. State, 341 P. 2d 610 (Crim. App. Okla. 1959).

In sum, there is substantial authority that the court which reviews a sentence imposed after a defendant has pleaded guilty or

waived a substantial right in reliance on the prosecutor's promised recommendation, may impose a remedy which is effective under the circumstances. If the parties cannot be returned to status quo ante then the court should do the best that it can to effectuate the bargain as intended by the parties.

It is undisputed that, as a result of the joint plea bargain, Mr. Bergman pleaded guilty in federal court, was sentenced by Judge Frankel to a term of four months and completely served that sentence. It is also undisputed that pursuant to the plea bargain, Dr. Bergman disclosed to the prosecutor his relationship with Albert Blumenthal, waived the transactional immunity he would otherwise have had [CPL §§ 190.40, 50.10] testified before the Grand Jury, was indicted based on his testimony, and pleaded guilty to that indictment. There is, realistically, no way that Mr. Bergman today, could be returned to the status quo ante.

There is no way to undo the federal jail sentence which has been served. Compare Jordon v. Commonwealth, supra; Palermo v. Warden, supra. And there is no way in which Mr. Bergman can undo the disclosure of his relationship to Albert Blumenthal. Compare United States v. Bayer, 331 U.S. 532, 540 (1947) ("Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.") Of course, the publicity surrounding the federal plea and the state plea cannot be

undone and it strains credulity that Mr. Bergman could receive a fair trial. In light of all the developments since the entry of the guilty pleas, clearly Mr. Bergman has been irreparably prejudiced. Clearly the cases cited above establish that this court can fashion an appropriate remedy to grant Mr. Bergman effective performance of the result he was promised.

Of course, if the court concludes that it will not order such an enforcement, then, at the very least, the case should be remanded to state court for resentencing in front of a different judge. Also, the prosecutor would have to carry out, under this Court's supervision, his obligation to recommend that for the reasons specified in the plea agreement, no sentence additional to the federal sentence be imposed in state court. In order to insure that the obligation is carried out in a constitutionally appropriate manner, this Court should approve, in advance, the prosecutor's sentence recommendation. That resentencing alternative while perhaps a "hollow" one, is one which the petitioner surely does not waive.

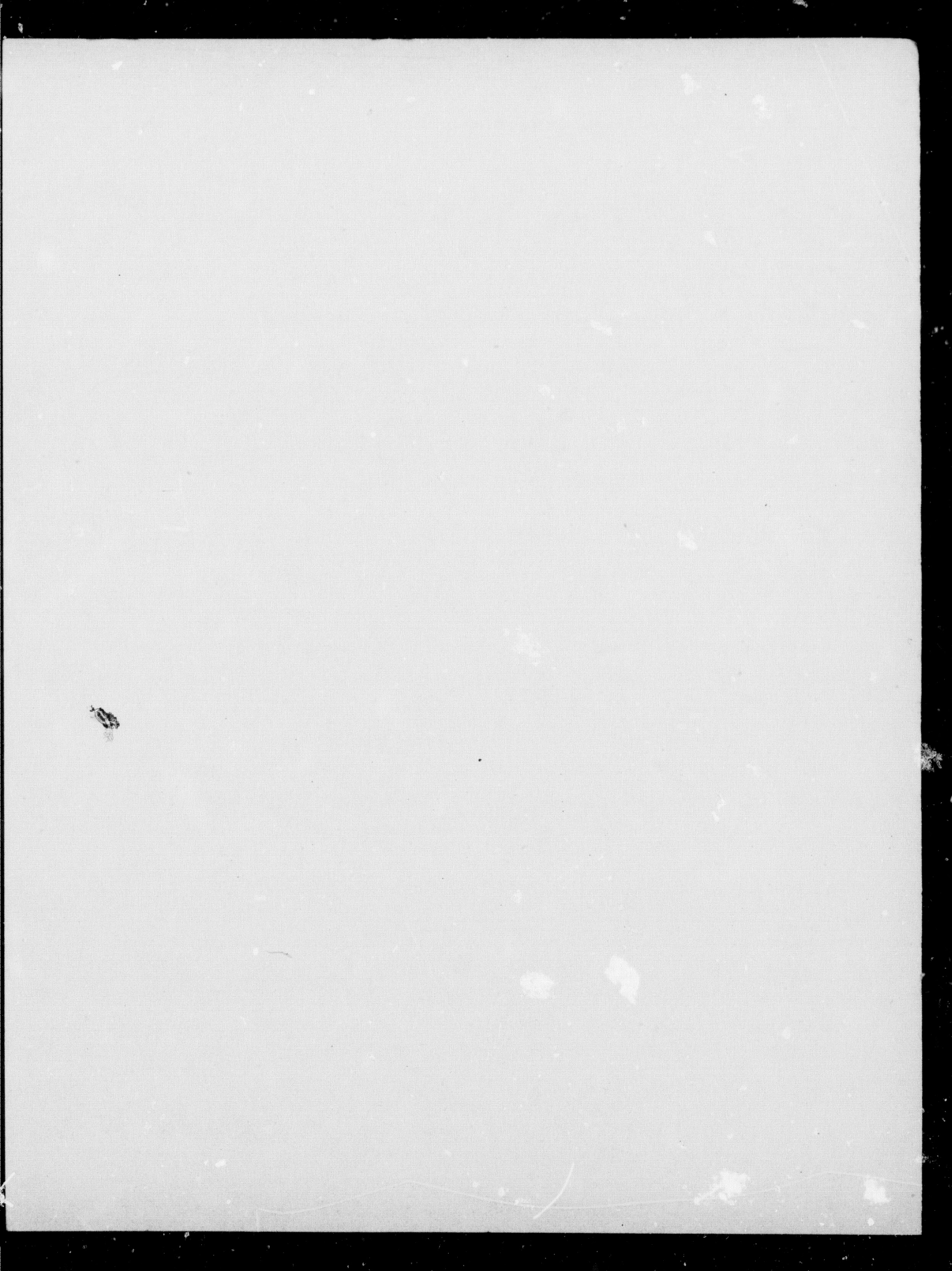
CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR APPROPRIATE RELIEF.

Respectfully submitted,

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Service of 2 copies of the
within Brief is hereby
admitted this 25th day of

Oct. 19 77
Signed John W. Deane
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